No. 361

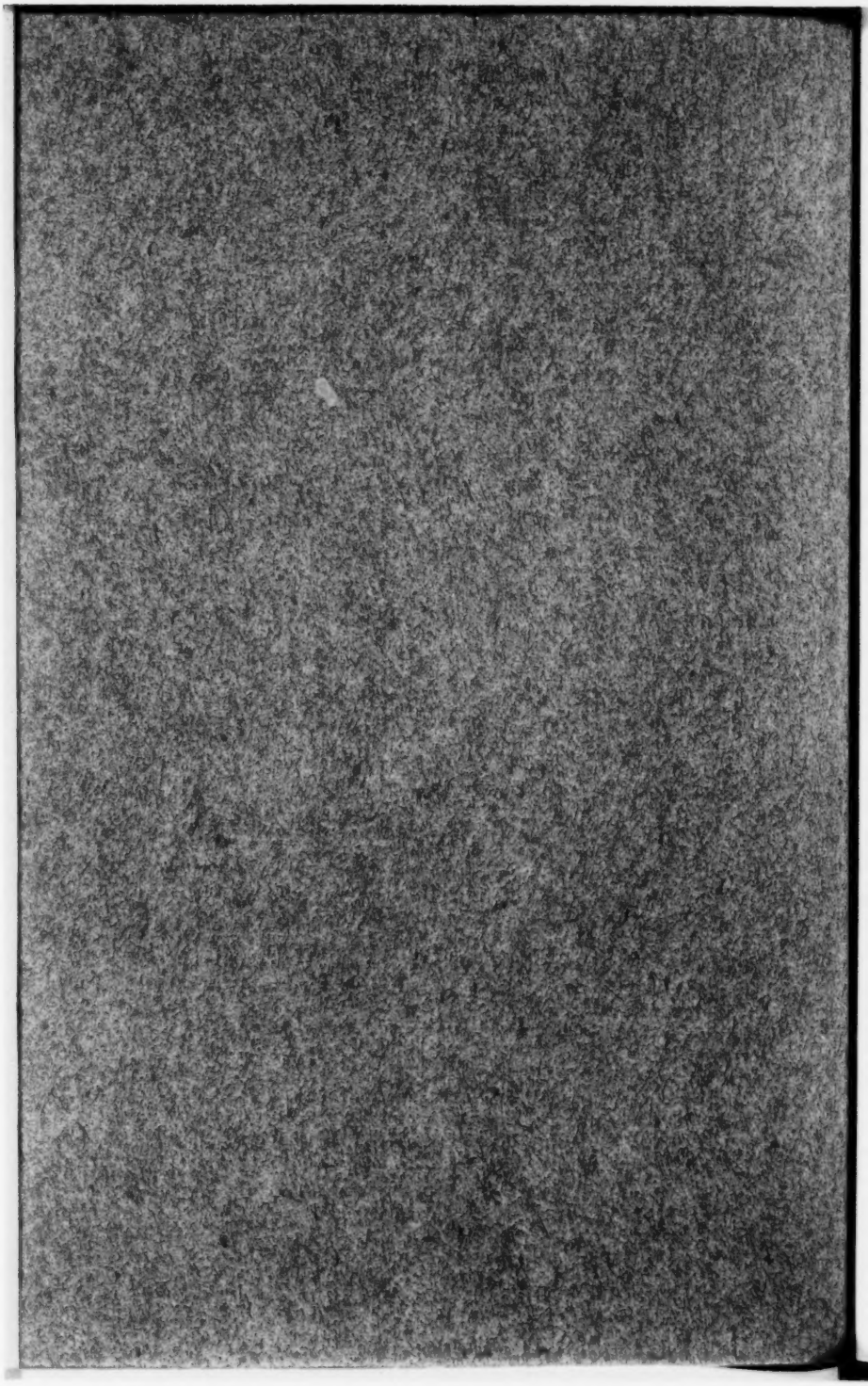
In the Supreme Court of the United States

October Term, 1941

WM. G. BROMLEY, RECEIVER FOR HOOSIER VENEER COMPANY, PETITIONER

v.

[illegible]



INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Argument	9
Conclusion	20
Appendix	21

CITATIONS

Cases:

Amalgamated Utility Workers v. *Cons. Edison, Co. et al.*, 309 U. S. 261	10
American Surety Co. v. *Baldwin*, 287 U. S. 156	12
Art Metals Const. Co. v. *National Labor Relations Board*, 110 F. (2d) 148	19
Board of Commissioners v. *United States*, 308 U. S. 343	18
Burke v. *Morphy*, 109 F. (2d) 572	10, 12
Chesapeake & Delaware Canal Co. v. *United States*, 250 U. S. 123	18
F. W. Woolworth Co. v. *National Labor Relations Board* (C. C. A. 2), decided July 2, 1941	15
Fullerton v. *Fordyce*, 121 Mo. 1	14
General Electric Co. v. *Munder Electrical Co.*, 22 F. Supp. 291	11
Grabbe v. *Moffitt*, 133 Ia. 54	10
Grand International Brotherhood, etc. v. *Morphy*, 109 F. (2d) 576	12
Hamilton-Brown Shoe Co. v. *National Labor Relations Board*, 104 F. (2d) 49	15
H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514	14
Hopkins v. *United States*, 246 U. S. 655	11
Hunt v. *Conner*, 26 Ind. App. 41	10
Hupfeld v. *Automaton Piano Co.*, 66 Fed. 788	11
International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72	14, 19
Kerr v. *Little*, 39 N. J. Eq. 83	14
Lion Bonding & Surety Co. v. *Karatz*, 262 U. S. 77	11
Marlin-Rockwell Corp. v. *National Labor Relations Board*, 116 F. (2d) 586, certiorari denied, No. 1032, October Term 1940, decided June 2, 1941	17

406316—41——1

Cases—Continued. Page

McNulta v. *Lochridge*, 137 Ill. 270, affirmed on another point, 141 U. S. 327 ..... 10, 13, 14
Mikkelson v. *Truesdale*, 63 Minn. 137 10
Montgomery Ward & Co. v. *National Labor Relations Board*, 107 F. (2d) 555 15
National Labor Relations Board v. *Aluminum Products Co.*, 120 F. (2d) 567 ..... 17, 18
National Labor Relations Board v. *Bradford Dyeing Association*, 310 U. S. 318 19
National Labor Relations Board v. *Carlisle Lumber Co.*, 99 F. (2d) 533 16
National Labor Relations Board v. *Colten*, 105 F. (2d) 179 10
National Labor Relations Board v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 19
National Labor Relations Board v. *Express Publishing Co.*, No. 442, October Term, 1940, decided March 3, 1941 13
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453 ..... 14, 16
National Labor Relations Board v. *General Motors Corp.*, 116 F. (2d) 306 10
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 15
National Labor Relations Board v. *Louisville Refining Co.*, 102 F. (2d) 678, certiorari denied, 308 U. S. 568 15
National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862, certiorari denied, 304 U. S. 576 ..... 15, 19
National Labor Relations Board v. *Somerset Shoe Co.*, 111 F. (2d) 681 19
National Labor Relations Board v. *Superior Tanning Co.*, 117 F. (2d) 881, certiorari denied No. 784, October Term, 1940 18
National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 17
North Whittier Heights Citrus Association v. *National Labor Relations Board*, 109 F. (2d) 76, certiorari denied, 310 U. S. 632 ..... 15, 17
Phelps Dodge Corp. v. *National Labor Relations Board*, Nos. 387, 641, October Term, 1940, decided April 28, 1941 ..... 16, 17
Press Co. v. *National Labor Relations Board*, 118 F. (2d) 937, certiorari denied, No. 1046, October Term, 1940, June 2, 1941 15
Triplex Screw Co. v. *National Labor Relations Board* (C. C. A. 6), decided March 14, 1941 18
Tyler, Ex parte, 149 U. S. 164 11
United States v. *Federal Surety Co.*, 72 F. (2d) 961, certiorari denied, 294 U. S. 711 11
United States v. *Illinois Surety Co.*, 238 Fed. 840 11

Statutes:
Page
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151, *et seq.*):
Sec. 2 21
Sec. 7 21
Sec. 8 22
Sec. 9 22
Sec. 10 23
Railway Labor Act, 48 Stat. 1185 (45 U. S. C. A. Sec. 151, *et seq.*) 12
Miscellaneous:
H. Rept. No. 1174, 74th Cong., 1st Sess., pp. 23–24 11

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 261

WM. C. BACHELDER, RECEIVER FOR HOOSIER VENEER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court below (Pro. 71–79)[1] is not yet reported. The findings of fact, conclusions

[1] Pursuant to a stipulation of the parties (Pro. 124–125), the printed record for purposes of the petition for certiorari consists of (1) the appendix to petitioner's brief filed in the court below, which is referred to herein by the symbol (P. A.); (2) the appendix to the Board's brief filed in the court below, which is referred to herein by the symbol (B. A.); and (3) the supplemental proceedings before the court below, which are referred to herein by the symbol (Pro.).

of law, and order of the National Labor Relations Board (B. A. 63–102) are reported in 21 N. L. R. B. 907.

JURISDICTION

The decree of the court below (Pro. 119–122) was entered on April 16, 1941. A petition for rehearing filed by petitioner (Pro. 81–118) was denied on April 14, 1941 (Pro. 122). The petition for a writ of certiorari was filed on July 12, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act applies to a receiver appointed by a state court.

2. Whether the Board is empowered to act upon unfair labor practice charges against a state court receiver without leave of the appointing court.

3. Whether the Board may issue an order against a successor receiver upon the basis of findings that the predecessor receiver committed unfair labor practices.

4. Whether a receiver is responsible, in the absence of authorization or knowledge, for the anti-union activities of his supervisory employees.

5. Whether there is substantial evidence to support the Board's findings that petitioner's predecessor as receiver discriminated against 14 of his

employees in violation of Section 8 (3) and (1) of the Act.

6. Whether the Board may award back pay without reinstatement to employees found to have been discriminated against.

7. Whether, in the circumstances of this case, the Board could validly hold that the persons found to have been discriminated against remained "employees" within the meaning of Section 2 (3) of the Act.

8. Whether the court was required to deny enforcement to the Board's order by reason of the fact that a period of 18 months elapsed between the issuance of the complaint and the issuance of the order, and a further period of 7½ months between the issuance of the order and the filing of the petition for enforcement.

9. Whether the Act applies to the business of petitioner.

10. A further question urged by petitioner, but which we think is not properly presented, is whether the Board can validly find a refusal to bargain in violation of Section 8 (5) in the absence of a prior determination by the Board under Section 9 as to the appropriate bargaining unit and the exclusive employee representative therein.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon proceedings had pursuant to Section 10 of the Act,[2] the Board on March 22, 1940, issued its findings of fact, conclusions of law, and order (B. A. 63–102). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[3]

Petitioner, as successor receiver of Hoosier Veneer Company, is engaged at Indianapolis, Indiana, in the manufacture and sale of veneer and

---

[2] These proceedings were: Amended charge filed by United Veneer and Lumber Workers Industrial Union No. 607 (B. A. 1–2); complaint of the Board issued on September 26, 1938, against Hoosier Veneer Company and Frank F. Woolling, receiver for said Company (B. A. 3–7); hearing before a trial examiner (B. A. 14), at which the Company appeared generally and answered (B. A. 11–12) and receiver Woolling appeared specially to contest the Board's jurisdiction (B. A. 13); intermediate report of the trial examiner (B. A. 15–51); and exceptions thereto by the Union (B. A. 52).

Thereafter, on January 15, 1939, receiver Woolling died, and on January 17, 1939, the Marion County Circuit Court appointed Bachelder, the petitioner herein, as successor receiver (B. A. 227–228). By supplemental complaint (B. A. 57–58), the Board substituted Bachelder in place of Woolling as a party respondent in the proceeding before it. At a hearing on the supplemental complaint (B. A. 61), Bachelder appeared specially to contest the Board's jurisdiction (B. A. 60). On May 29, 1939, the Board directed that no intermediate report be issued by the trial examiner in the further hearing (B. A. 62).

[3] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

related products (B. A. 66; 127, 128). Woolling, the original receiver, in the course of business during 1937 imported substantial quantities of raw material from points outside the State of Indiana, and from 1933 to 1937 shipped a major portion of the products of the company, ranging in value from approximately $250,000 to more than $500,000 annually, to points outside the state (B. A. 67; 127–130, 226). During his administration, Woolling retained H. E. Daugherty, former president of the company, and J. C. Daugherty, former secretary-treasurer, to assist him in managing the business. To them and to various other supervisory employees Woolling delegated responsibilities for production, sales, and personnel, including the hiring and discharging of employees (B. A. 66–67; 127, 132, 140, 149, 153, 173–175; P. A. 28).

From July to September 1937 the United Veneer and Lumber Workers Industrial Union No. 607, herein called the Union, conducted an organizing campaign at the Hoosier Veneer plant, and by September 30 a majority of employees in the unit found appropriate by the Board had designated the Union as their collective bargaining agent (B. A. 67, 85–86, 99; 104, 175, 214). Beginning in the latter part of August, Woolling, the two Daughertys, and plant superintendents Connor and Randall sought vigorously to block the spread of the Union organizing movement; they interrogated numerous employees concerning their

Union membership, expressed strong displeasure at the activities of the Union, and threatened employees with loss of their jobs and the closing of the plant (Woolling: B. A. 67, 69, 86; 107, 135; H. E. Daugherty: B. A. 67–70, 177–178; 140, 146–147, 149, 173–175, 177; J. C. Daugherty: B. A. 67–68; 153–154; Connor: B. A. 67–70; 145, 150, 153, 157, 161, 166–170, 172, 176; Randall: 67, 69; 134).

On October 10 or 11, 1937, Woolling, having received bargaining overtures from the Union, applied for instructions to the Marion County Circuit Court (B. A. 71, 85–86; 104–107, 206–208, 216–217; P. A. 51–54). That court on October 11 ordered Woolling (a) to terminate all manufacturing operations except those necessary for the fulfillment of orders or to prevent unusual depreciation, (b) to treat with his employees concerning conditions of employment, and (c) to investigate alleged acts of sabotage at the plant, report to the court the persons responsible therefor, and discharge and never reemploy any persons found to have been guilty of sabotage (B. A. 71; 220–221). Woolling thereupon closed the plant, but within 2 or 3 days gradually resumed operations; on November 1 he had recalled some 57 employees, including all but 3 of the 31 non-Union employees and only 29 of the 96 Union members (B. A. 71, 76; 187, 111–112, 214–215, 202–203). Among the members of the Union not reinstated were its president (B. A. 72; 133–134, 105, 110–111), vice president (B. A. 72; 152,

105, 110), treasurer (B. A. 72–73; 145, 109–111, 114), and two additional members of its negotiating committee (B. A. 73; 143, 161), as well as nine others active in membership solicitation (B. A. 73–74; 149–150, 153, 156, 163, 165–169, 172, 174). Of this group of 14, five were veteran employees, and the work of all had been satisfactory or better (B. A. 72–74; 131–132, 142, 144–145, 150–153, 155–156, 161, 163, 165, 167, 169, 172, 174). H. E. Daugherty, Woolling's chief agent, made statements to or concerning at least six of this group, to the effect that their Union membership was a conclusive bar to reinstatement (B. A. 68–70, 77; 140, 146, 154, 173, 175). Petitioner's explanations why these men were refused reinstatement are not supported by the evidence (B. A. 79–82; 143, 158–159, 177, 184–186, 193–195, 197, 200, 214–215). The Board found that Woolling, in reinstating employees after the shut-down of the plant, systematically weeded out the Union's officers and most active members (B. A. 82).

From October 13, 1937, to June 2, 1938, numerous fruitless conferences were held between the Union and H. K. Bachelder, named by Woolling as his spokesman; neither Woolling nor Bachelder made any genuine effort to reach an agreement with the Union, and Bachelder refused to recognize it as the bargaining representative of the employees (B. A. 87–94; 109–119, 209–213, 222–225).

Upon the foregoing evidentiary findings, the Board found that the receiver Woolling had interfered with, restrained, and coerced his employees in the exercise of the rights guaranteed by Section 7 of the Act; that, by refusing to reinstate the 14 Union leaders, he had discriminated in regard to their hire and tenure of employment; and that he had refused to bargain collectively with the Union, which was the exclusive representative of his employees in an appropriate unit. The Board accordingly determined that there had been a violation of Section 8 (1), (3), and (5) of the Act (B. A. 71, 82–83, 94, 99–100). The Board's order required petitioner to cease and desist from the unfair labor practices found, to bargain collectively with the Union, to offer appropriate reinstatement with back pay to the employees discriminated against, and to post notices (B. A. 100–102).[4]

On November 8, 1940, the Board filed in the court below a petition for enforcement of its order (Pro. 55–62). On December 28, 1940, petitioner filed with the court his motion to dismiss the Board's petition on jurisdictional grounds (Pro. 62–63). The Board filed its opposition to this motion (Pro. 64–70). On January 6, 1941, the court denied petitioner's motion without prejudice to its renewal at the hearing of the cause on the merits (Pro. 71).

[4] The Board dismissed the complaint insofar as it alleged that the Company had engaged in or was engaging in unfair labor practices within the meaning of the Act, but directed that the order run against the Company in the event the receivership should be discharged (B. A. 96, 100, 102).

On March 13, 1941, the court below handed down its opinion (Pro. 71–79) denying petitioner's renewed motion to dismiss the petition and enforcing the Board's order, with a modification not here material. A petition for rehearing filed by petitioner (Pro. 81–118) was denied on April 14, 1941 (Pro. 122), and on the same day a decree was entered pursuant to the court's opinion (Pro. 119–122).

ARGUMENT

1. Petitioner's contention (Pet. 16–17, 30–32) that the Act does not apply to a receiver appointed by a state court is refuted by the express terms of the statute. Section 10 (a) of the Act empowers the Board—

> to prevent *any person* from engaging in any unfair labor practice (listed in section 8) affecting commerce.[5] [Italics added.]

Section 2 (1) defines the term "person" as including—

> one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, *or receivers*. [Italics added.]

These provisions make clear the legislative purpose to apply the sanctions of the Act irrespective of

[5] Moreover, Section 10 (b) provides that whenever it is charged that "any person" has engaged in unfair labor practices, the Board may issue and serve upon "such person" a complaint, and Section 10 (c) authorizes the Board to issue orders against "any person" found to have engaged in such practices.

the legal form of the employing agency, and without regard to changes in the ownership or control of business by operation of law or otherwise. *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); compare *Burke* v. *Morphy*, 109 F. (2d) 572, 575 (C. C. A. 2). Particularly when considered in the light of the manifest purpose of the entire Act, the quoted language plainly authorized the Board to proceed in the instant case against the original receiver and against petitioner, his successor.[6]

2. Petitioner also contends (Pet. 17, 32–36) that the Board may not act upon unfair labor practice charges against a state court receiver without leave of the appointing court. But the Act confers exclusive power to prevent unfair labor practices upon the Board, and exclusive jurisdiction to enforce or review Board orders upon the federal courts. Section 10 (a), (e), and (f); *Amalgamated Utility Workers* v. *Consolidated Edison Co. et al.*, 309 U. S. 261, 264, 266, 269; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d)

[6] Petitioner's attempt (Pet. 30–31) to set up an artificial distinction between a "receiver" and a "receivership" does not merit serious consideration. Nor is his cause advanced by the suggestion (Pet. 31–32) that a "receivership court" may be an "employer of labor." The receiver himself, not the court, is the employer in this case, as the Board found (R. A. 99). *Grabbe* v. *Moffitt*, 133 Ia. 54, 110 N. W. 142; *McNulta* v. *Lochridge*, 137 Ill. 270, 279, aff'd on another point, 141 U. S. 327; *Mikkelson* v. *Truesdale*, 63 Minn. 137; *Hunt* v. *Conner*, 26 Ind. App. 41, 44.

306, 312 (C. C. A. 7); H. Rept. No. 1174, 74th Cong., 1st Sess., pp. 23–24. The effect of petitioner's contention would be to subject the functioning of the Board and of the federal courts in the exercise of power expressly conferred upon them by Congress to the discretionary control of a state court. This would be clearly intolerable. *Cf. Hopkins* v. *United States,* 246 U. S. 655, aff'g *per curiam, United States* v. *Illinois Surety Co.,* 238 Fed. 840 (D. N. C.); *Hupfeld* v. *Automaton Piano Co.,* 66 Fed. 788, 789 (C. C. S. D. N. Y.); *General Electric Co.* v. *Munder Electrical Co.,* 22 F. Supp. 291, 296–297 (D. Mass.); *United States* v. *Federal Surety Co.,* 72 F. (2d) 961, 963 (C. C. A. 4), certiorari denied, 294 U. S. 711.

Petitioner relies on *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, and *Ex parte Tyler,* 149 U. S. 164, which hold generally that a court appointing a receiver of property is entitled to decide whether it will allow suits against the receiver to be brought and determined in other courts. The purpose of this general rule is to permit the orderly settlement of claims against the receivership by the court which has jurisdiction to pass upon such claims and which bears the responsibility for the estate, and to prevent interference by another court with property in the possession of an officer of the receivership court. The whole purpose of the rule fails and its inapplicability is plain in a case like the one at bar, where no interference

with the possession of property is involved, where the receivership court is devoid of power to act, and where exclusive jurisdiction of the subject matter has been conferred by Congress upon another and different tribunal.

Nor is there any conflict, as petitioner asserts, with *American Surety Co.* v. *Baldwin*, 287 U. S. 156. There is no question here of the denial by a federal court of "full faith and credit" to the proceedings of a state court. The tenuousness of petitioner's argument is shown by the fact that he finds it necessary, in order to give color to the claim of a clash between federal and state jurisdiction, to conjure up the highly improbable prospect of an order by the receivership court directing the receiver to disobey the enforcement order of the court below (Pet. 34). The cases of *Burke* v. *Morphy*, 109 F. (2d) 572 (C. C. A. 2) and *Grand International Brotherhood, etc.* v. *Morphy*, 109 F. (2d) 576 (C. C. A. 2), not only do not support petitioner's contention, but on the contrary indicate that the authority of the National Mediation Board under the Railway Labor Act (48 Stat. 1185, 45 U. S. C. § 151, *et seq.*) is superior to that of a railroad receivership court.[7]

---

[7] Petitioner's further contention (Pet. 20, 49-50) that the direction to reinstate employee Holyfield conflicts with the receivership court's order not to reemploy persons found guilty of sabotage (*supra*, p. 6), is without merit. The "sabotage" alleged in Woolling's petition to the court for

3. Petitioner assails the Board's order on the further ground that the order runs against him as successor receiver, although the unfair labor practices were found to have been committed by his predecessor in office (Pet. 16, 28–30). The contention is insubstantial. Petitioner was substituted for the deceased predecessor receiver in the Board proceeding, and the resulting order was accordingly properly directed to him, as the court below held (Pro. 73–74). See *McNulta* v. *Lochridge*, 141 U. S. 327, 331–332. The substitution of one receiver for another does not alter the character of the employing agency or purge that agency of the unfair labor practices committed during the course of the receivership. Indeed, the protection afforded by the Act might frequently be denied to the employees of a company in receivership if the mere substitution of one receiver for another were held to deprive the Board of jurisdiction. Contrary to petitioner's assertion, there is no possibility of conflict between the decision of the court below in this respect and the decision of this Court in *National Labor Relations Board* v.

---

instructions appears to have consisted of (1) faulty inspection of veneer and (2) damage to veneer by water (B. A. 184–185). Woolling admittedly could never fix the guilt for the water damage (B. A. 186), and, as the Board found (B. A. 79–80), there is no plausible evidence to link Holyfield with the faulty inspection. Though expressly instructed by the receivership court to inform it as to the persons responsible for the sabotage (*supra*, p. 6), Woolling never made any report on the matter.

Express Publishing Co., No. 442, October Term, 1940, decided March 3, 1941.

4. Petitioner further contends (Pet. 18–19, 36–39, 42–43) that a receiver may not be held responsible, in the absence of authorization or knowledge, for the anti-union activities of his supervisory staff. In the case of an ordinary employer, such a contention has been foreclosed by the decisions of this Court in *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 519–521, and *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 79–81. In the instant case the receiver stands in the relationship of employer *vis-a-vis* the employees (see cases cited *supra,* p. 10, fn. 6), and the responsibility which would, absent the receivership, have attached to the company, rests upon the receiver. *McNulta* v. *Lochridge,* 137 Ill. 270, 279, aff'd on another point, 141 U. S. 327; *Kerr* v. *Little,* 39 N. J. Eq. 83, 85; *Fullerton* v. *Fordyce,* 121 Mo. 1, 8–9. The supervisory status of the four employees here involved—the two corporate officials and the two superintendents—was established by the Board (B. A. 66–67), and the court below sustained the finding (Pro. 72, 75). The evidence amply supports the concurrent holdings of the Board and the reviewing court upon this issue of fact. *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 461.

5. Petitioner's assertion (Pet. 19–20, 44–47) that the receiver's disproportionate treatment of Union and non-Union workers does not constitute substantial evidence of unlawful discrimination is contrary to the settled rule in the circuit courts of appeals.[8] Nor is direct proof that the receiver "knew the identity of more than 10 or 15" of the Union members (Pet. 46) essential to the finding of discrimination. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 602; *F. W. Woolworth Co.* v. *National Labor Relations Board* (C. C. A. 2), decided July 2, 1941. The broader claim that the Board's findings as to unlawful discrimination are not supported by substantial evidence is not a question of general importance; moreover, the entire evidence reviewed in the Statement (*supra*, pp. 5–7) affords full support for the findings.

---

[8] See *F. W. Woolworth Co.* v. *National Labor Relations Board* (C. C. A. 2), decided July 2, 1941; *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 559–560 (C. C. A. 7); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 866 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681 (C. C. A. 6), certiorari denied, 308 U. S. 568; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49, 53 (C. C. A. 8); *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76, 78–79 (C. C. A. 9), certiorari denied, 310 U. S. 632; *Press Co.* v. *National Labor Relations Board*, 118 F. (2d) 937, 941 (App. D. C.), certiorari denied, No. 1046, October Term, 1940, June 2, 1941.

6. Petitioner challenges (Pet. 19, 43–44) the award of back pay to employees Coffey and Peters (to whom petitioner was not ordered to offer reinstatement), asserting a conflict with *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9). But the Board's power to direct back pay unaccompanied by the normal reinstatement remedy has since been sustained by this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, October Term, 1940, decided April 28, 1941.

7. Petitioner assails (Pet. 20, 48–49) the Board's finding that the workers found to have been discriminated against retained their employee status after the shut-down of the plant (B. A. 75). The court below sustained the finding (Pro. 78). The evidence amply sustains the concurrent holdings of the Board and the reviewing court upon this issue of fact. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461.

It is clear that the order of the receivership court did not contemplate a complete and permanent cessation of operations, and it was obviously not so construed by the receiver (*supra*, p. 6). There is no evidence, except in the case of one employee, that any of the persons affected by the shut-down were dismissed in terms importing discharge. The plant reopened almost immediately, and within 3 weeks had resumed operations on a substantial scale (*supra*, p. 6). Employees ob-

taining reinstatement were not required to execute new employment applications (B. A. 175–176). The Board plainly could find that the shut-down did not completely sever the employment relationship. *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, 82 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 218–219; *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586, 588 (C. C. A. 2), certiorari denied, No. 1032, October Term, 1940, decided June 2, 1941.

8. Petitioner's claim (Pet. 20–21, 50–53) that the Board forfeited all right to enforcement of its order because of laches is of a type which has been uniformly rejected under the Act.[9] *Phelps Dodge*

[9] Petitioner's statement (Pet. 51) that 28 months elapsed between the filing of charges and the issuance of the Board's order is quite misleading. While one witness testified to the filing of a charge as early as November 12, 1937 (P. A. 1), there is no evidence of the nature of this charge or whether it was pressed. The conferences between the Union and the receiver continued until June 2, 1938 (*supra*, p. 7); the charge on which the complaint was based (B. A. 1–2) is dated September 24, 1938, and the complaint was issued 2 days later (B. A. 3–7). Actually only 18 months elapsed between the issuance of the complaint and the Board's order, and the petition for enforcement was filed seven and one-half months later. At any time after the Board's order, petitioner could, of course, have sought review under Section 10 (f) of the Act. *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567 (C. C. A. 7).

Corp. v. *National Labor Relations Board,* Nos. 387, 641, October Term, 1940, decided April 28, 1941; *Triplex Screw Co.* v. *National Labor Relations Board* (C. C. A. 6), decided March 14, 1941; *National Labor Relations Board* v. *Superior Tanning Co.,* 117 F. (2d) 881 (C. C. A. 7), certiorari denied, No. 784, October Term, 1940, April 7, 1941; *National Labor Relations Board* v. *Aluminum Products Co.,* 120 F. (2d) 567 (C. C. A. 7). Moreover, the defense of laches is not available in a proceeding brought by an agency of the federal government. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *Board of Commissioners* v. *United States,* 308 U. S. 343.

9. Petitioner's contention (Pet. 21, 54) that the business of the receivership does not affect commerce within the meaning of the Act presents no question for review. The evidence summarized in the Statement (*supra,* pp. 4–5) affords ample support for the Board's findings on this issue (B. A. 66–67, 94, 100), which were sustained by the court below (Pro. 73).

10. Petitioner further contends (Pet. 18–19, 39–42) that an employer may not be found to have violated Section 8 (5) of the Act in the absence of a prior determination by the Board under Section 9 as to the appropriate bargaining unit and the exclusive employee representative therein. This contention was not made either before the

Board or the court below, and consequently is not now available (Section 10 (e)). Moreover, the receiver never based his refusal to bargain with the Union upon any question as to majority or appropriate unit, as the court below specifically noted (Pro. 76). See *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 868, 869 (C. C. A. 2), certiorari denied, 304 U. S. 576; *Art Metals Const. Co.* v. *National Labor Relations Board*, 110 F. (2d) 148, 150 (C. C. A. 2); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756, 757 (C. C. A. 2).

But in any event, there is no merit in petitioner's contention. Nothing in the Act, either expressly or by implication, makes certification under Section 9 a condition precedent to an employer's duty to bargain with the majority representative of his employees. This Court and the various circuit courts of appeals have repeatedly sustained and enforced Board orders based on findings of Section 8 (5) violations in cases involving no prior proceedings under Section 9. See, *e. g.*, *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
RICHARD H. DEMUTH,
Attorney.

ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
ERNEST A. GROSS,
Assistant General Counsel,
FREDERICK M. DAVENPORT, JR.,
National Labor Relations Board Attorney.

AUGUST 1941.